



(29,719)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 409

W. DUCKETT & COMPANY, INC., APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

INDEX

	Original	Print
Proceedings in the Court of Claims.....	1	1
Petition	1	1
Exhibit 1 to Petition—Contract between South Terminal Co. and A. W. Duckett & Co., Inc., September 19, 1916.....	5	3
General traverse.....	14	8
Argument and submission.....	14	8
Findings of fact.....	15	8
Conclusion of law.....	22	17
Opinion, Downey, J.....	23	17
Judgment	31	26
Proceedings after entry of judgment.....	31	26
Memorandum overruling motion for new trial.....	32	26
Petition for and order allowing appeal.....	36	31
Werk's certificate.....	37	31

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IN THE

UNITED STATES COURT OF CLAIMS, WASHINGTON, D. C.

Number 34218

A. W. DUCKETT & COMPANY, INC.

vs.

THE UNITED STATES OF AMERICA.

PETITION—Filed Oct. 31, 1919

the Honorable the Court of Claims of the United States:

Plaintiff, through its attorneys, Almy, Van Gordon & Evans, respectfully shows:

Plaintiff is a corporation, organized and doing business under and by virtue of the laws of the State of New York, with its principal offices at Seventeen (17) Battery Place, Borough of Manhattan, County, State and City of New York.

The United States is sued herein upon an implied contract with Government of the United States under the general jurisdiction of this Court, conferred by Chapter 7, Section 145 of the Judicial Code of the United States.

Plaintiff was on and prior to January the 30, 1918, the lessee, and as such was in peaceful possession of a certain pier or wharf, commonly known as pier number eight (8), owned by the Bush Terminal Company, Borough of Brooklyn, City of New York; that copy of the lease, under which plaintiff operated and enjoyed the use of the said pier, is attached hereto and made a part hereof, and marked exhibit one (1).

.2] 4. Plaintiff was entitled to the peaceful possession and use of the said pier to and including September the 30, 1919, by virtue of the said lease; copy of which is marked exhibit one (1) and attached hereto.

5. Defendant on or about January the 31st, 1918, requisitioned said pier and all the rights and privileges accruing to the plaintiff under said lease beforementioned, and that plaintiff did peacefully surrender to one Hayden S. Cole, who represented himself to be an officer, and was in fact an officer in the United States Army, assigned to the duty of taking charge of docks, wharfs and terminals of the War Department, the plaintiff believing that such peaceful surrender of the said lease and possession of the said pier was pursuant to the orders of the War Department, and it was in fact pursuant to the orders of the War Department.

6. Plaintiff has been deprived of the possession, use and benefit of the said pier and the rights and privileges accruing under the said lease for a period of Six-hundred and seven (607) days, to-wit, from January the 31st, 1918, to September the 30th, 1919, on account of the said requisitioning and occupation by defendant.

7. A reasonable value for the use of said pier was Four Hundred (\$400.00) Dollars per day, totaling the sum of Two Hundred and Forty-two Thousand and Eight Hundred (\$242,800.00) Dollars.

8. Plaintiff is entirely and exclusively entitled to receive compensation in advance for the use of said pier by defendant from January the 31st, 1918, to September 30th, 1919.

9. Defendant has damaged your petitioner in the sum of Two Hundred and Forty-two Thousand and Eight Hundred (\$242,800.00) Dollars, all of which has resulted in great inconvenience and hardship to said plaintiff and the said plaintiff has demanded of said [fol. 3] defendant payment in full of the amount before-mentioned, which payment has been refused.

Wherefore, plaintiff prays for a judgment or decree against the United States of America for the sum of Two Hundred and Forty-two Thousand and Eight Hundred (\$242,800.00) Dollars, with interest thereon from the 31st day of January, 1918, together with all reasonable costs and disbursements, including reasonable attorneys' fees, and for such other and further relief in the premises as the Court may, in its wisdom, deem proper.

A. W. Duckett & Company, Inc., By D. F. Leary, President.
Almy, Van Gordon & Evans, Plaintiff's Attorneys, 46
Cedar Street, Borough of Manhattan, County, State and
City of New York.

COUNTY, STATE AND CITY OF NEW YORK,
Borough of Manhattan, ss:

Daniel F. Leary, being duly sworn, deposes and says: I am the President of the A. W. Duckett & Company, Inc., plaintiff herein.

The foregoing petition is true to the best of my knowledge and belief, except as to the matters therein stated to be alleged upon information, and as to those matters I believe it to be true.

D. F. Leary.

Sworn to and subscribed before me this — day of —, 1919. —.

[fol. 4] Know all men by these presents that A. W. Duckett & Company, a corporation under the laws of the State of New York, does hereby make, constitute and appoint Almy, Van Gordon and Evans, as and for its attorney, to prosecute before the Court of Claims a suit against the United States as set forth in the enclosed

ition and does hereby ratify and confirm all and any matters prosecuted by said Almy, Van Gordon and Evans.

Signed and sealed this —, 1919.

A. W. Duckett & Company, D. F. Leary, Pres. (Seal.)

[fol. 5] EXHIBIT ONE TO PETITION

This Agreement, made this 19th day of September, 1916, between South Terminal Company, a corporation organized and existing under the laws of the State of New York, party of the first, and W. Duckett & Company, Inc., a corporation organized and existing under the laws of the State of New York, party of the second part,

Witnesseth:

That the party of the first part for and in consideration of the rents, agreements and covenants of the party of the second part herein contained, has demised, leased and let, and by these presents both demise, lease and let unto the said party of the second part, its successors and assigns, all that certain Pier of the party of the first part number 8, situated at the foot of 39th Street in the Borough of Brooklyn, City of New York, as shown on the map or diagram attached hereto and made a part of this lease, being the hole of said Pier of a length of approximately six hundred and twenty-five (625) feet, and in width sixty (60) feet, together with the right, subject to the limitations hereinafter contained, to use one-half of the slip adjoining said demised Pier on the south side hereof.

To have and to hold the above demised premises unto the party of the second part, its successors and assigns, for the term of three (3) years, beginning on the first day of October, 1916, at the annual rental of Sixty thousand (\$60,000) Dollars, payable in equal monthly installments on the first day of each and every month during said term, at the office of the party of the first part, No. 100 Broad Street, in the Borough of Manhattan, City of New York.

The party of the first part further covenants and agrees with the party of the second part, and its successors and assigns, as follows: To maintain a depth of water on the south side of the pier demised of not less than thirty (30) feet at mean low water; said depth to [fol. 6] begin at a point not less than eight (8) feet from the side of the pier, and to parallel the entire length of the same to a width of not less than 100 feet. The party of the first part further agrees that it will, as often as notice is received in writing from the party of the second part that two feet or more of fill have come into the dredged out portion, or into any part of the same where such fill interferes with navigation, re-dredge the same without cost or charge to the party of the second part.

In case any portion of the demised premises are so injured or destroyed by fire, or the elements, or the act of God, as to make it impossible to use them for the business of the party of the second part,

then the party of the first part agrees to rebuild or repair the same as speedily as possible, and in the meantime furnish, if possible, at another pier or piers upon its property, sufficient accommodation for the steamers of the party of the second part during such period as is occupied by the rebuilding or repair of the demised premises so destroyed or injured; and if such accommodation is not furnished to the party of the second part, no rent shall be paid or payable by the party of the second part until such repairs are completed, and if such rebuilding is not undertaken, or repairs made, within a reasonable time, the party of the second part may, at its option, surrender said demised premises to the party of the first part, whereupon this lease shall become null and void.

The party of the first part hereby covenants and agrees with the party of the second part, its successors and assigns, to keep said demises, during the term of this lease, in good repair, at its own expense, except that, in the event that such repairs shall be made necessary by the negligence of the party of the second part, its agents or servants, the cost of such repairs shall be borne by the said party of the second part.

Said party of the first part further covenants and agrees to maintain in the demised premises a suitable supply pipe for water, and [fol. 7] also to string electric wires and furnish lights and switches throughout the demised premises as, where and when required by the party of the second part for the furnishing of lights and power. The party of the second part shall provide for water and electricity, which shall be acceptable to the party of the first part and shall pay for such service as registered by such meters, according to the schedule of rates now adopted, or which may hereafter be adopted by the party of the first part for such service, or the party of the second part may for such service at such rates as are now or may hereafter be offered under written contract by the Edison Electric Illuminating Company of Brooklyn for the furnishing of a similar service.

The party of the first part covenants and agrees that the party of the second part shall have at all times during the term of this lease unrestricted access to and from the demised premises and that the roadway now existing shall at all times be maintained by the party of the first part in proper condition for the uses and purposes herein-after described of the party of the second part.

Said party of the first part further covenants and agrees with the party of the second part, its successors and assigns, at all times to warrant and defend the possession and use of the premises hereby leased.

The said party of the second part does covenant and agree with the party of the first part, its successors and assigns as follows:

To pay unto the said party of the first part, its successors and assigns, the above mentioned rent at the time and place stated for the payment thereof.

To commit no waste of said demised premises, nor suffer waste to be committed by others, and to surrender the said premises at the

nmination of this lease in the same condition as when received, reasonable wear and tear excepted.

[1.8] Not to pledge nor assign this lease, or rent out, underlet lease said premises, or any part thereof, or make any alterations therein, without the written consent of the party of the first part, but it is understood that the party of the first part will not withhold such consent unless, in its judgment, it has reasonable ground to do so.

Not to block the slip adjoining said demised premises with lighters or bargers, or in any manner, so as to prevent the passage of lighters, vessels or barges to other parts of the slip, and it hereby agrees to haul out of the way any vessel of its own or under its control, except a steamer lying alongside the pier and to cause to be hauled out of the way of any vessel, lighters or barges at the request of the party of the first, or its representatives, when such vessels, lighters or bargers may block the slip on the side of the herein demised premises; railroad carfloats which are unwieldy, and which interfere with the general use of the slip, shall not be received at the herein demised premises without special permission from the party of the first part. In the event that the party of the second part fails or refuses, after reasonable notice and request, to move any vessel or floating structure whatsoever belonging to it, or under its control, the party of the first part shall have the right to move such vessel or floating structure itself and charge the expense of such moving unto the party of the second part.

The party of the first part may collect from the owners or consignees thereof and retain for its own use and benefits the customary storage, labor and landing charges on goods arriving by the steamers of the party of the second part, and stored with the party of the first part, or stored on the demised premises; said charges shall not be made, if not customary to the trade, or be more than upon goods brought by competing lines. The party of the first part shall have [fol. 91] the right to collect and retain legal wharfage on all canal boats, barges, lighters or other harbor craft while lying at the pier hereby demised.

The party of the second part further covenants and agrees that it will, at its own expense, comply with all the requirements, present and future, of the Board of Health, Municipal authorities and Police and Fire Departments of the City of New York, and of any other lawfully constituted authority, and will comply with all rules and regulations of the New York Board of Fire Underwriters, and the New York Fire Insurance Exchange, relating to the herein demised premises, and will not allow smoking, or the use of kerosene lamps upon the demised premises, but the party of the second part shall not be responsible for any damage resulting from smoking or the use of kerosene lamps, contrary to its rules and regulations.

The party of the second part further covenants and agrees with the party of the first part to hold the latter harmless against any suit, claim, judgment or recovery on the part of any person against it, the party of the first part, by reason of any act or omission of

any person other than an agent or servant of the party of the first part, done or emitted on the premises hereby demised.

And the party of the second part further covenants and agrees with the party of the first part that in case the rent herein reserved be not paid in the manner and at the time herein provided, or in case the pier hereby demised shall be or become deserted or vacated, the term of this lease shall expire, at the option of the party of the first part, upon its giving three (3) days' notice in writing of its election to consider this lease terminated to the party of the second part, which notice may be given personally or by mail at the demised premises; thereupon this lease shall be deemed to have ceased and come to an end at the time fixed in the notice, in the same manner [fol. 10] and with the same effect as if the date fixed by said notice was the date originally stated herein for the expiration of the term of this lease, and the party of the first part shall have the right to enter the premises, either by force or otherwise, without being liable for any prosecution therefor, or the said party of the first part may take possession of the said premises by summary proceedings, by action or ejectment or by any other judicial proceedings appropriate to the case, or without legal proceedings whatsoever, and may re-let said premises at its option as the agent of said party of the second part, or otherwise, and receive the rent therefor, applying the same first to the payment of such expenses as it may have been put to in entering, dispossessing and letting and then to the payment of the rent and the fulfillment of the covenants of the party of the second part hereunder, and said party of the second part shall be liable as damages for any loss which may be sustained by reason of such default during the remainder of the term, whether the demised premises be re-let or remain vacant, such loss to be payable on the same days whereon the rent herein reserved would have become due but for the happening of such event, and the maintenance of any action or proceeding to recover any installment or installments thereof shall not preclude the party of the first part from thereafter maintaining and instituting subsequent actions or proceedings for the recovery of any subsequent installment or installments thereof. The party of the second part hereby expressly waives any notice of proceedings required by law to be given or taken preliminary to the entry or re-entry of the party of the first part, and any such entry or re-entry whatsoever shall not be deemed to absolve or discharge the said party of the second part from liability hereunder.

And the party of the second part further covenants and agrees with the party of the first part that in case of the violation by it of any of the covenants of this agreement (including the failure of [fol. 11] the party of the second part to pay the rent reserved herein, wholly or in part), then at the option of the said party of the first part, this lease shall become null and void, upon its giving the party of the second part three (3) days' notice in writing of its election to consider this lease terminated, all as provided in the preceding paragraph herein, whereupon this lease shall cease and come

to an end at the time and in the manner and with the effect specified in said paragraph, and with all the consequences, rights and liabilities of either party as set forth therein.

Anything herein contained to the contrary notwithstanding, it is hereby understood and agreed that, if at any time during the term above specified or any renewal or extension thereof, the party of the second part shall become insolvent or take the benefit of any insolvent act, or shall make an assignment for the benefit of creditors, or file a petition in bankruptcy or be adjudicated a bankrupt or a receiver or trustee of the property of the party of the second part shall be appointed by any Court in any legal proceeding, or this lease devolve upon or pass to any person or persons other than the party of the second part by operation of law or otherwise, then in each of such cases (without regard to the length of the term of this lease), it shall and may be lawful for the party of the first part, at its election, to declare this lease terminated in the manner and with the results set forth in the last preceding paragraph.

The party of the second part in consideration of the premises expressly waives any provision of law now in force, or hereafter enacted, giving to the party of the second part the right upon any conditions after default, to redeem and re-possess the said premises or any part thereof.

It is further understood and agreed that the covenants and agreements contained within this lease shall be binding upon the parties hereto and their legal representatives.

[fol. 12] In witness whereof, the party of the first part has caused its corporate name to be signed to these presents and its corporate seal to be hereunto affixed, and the party of the second part has caused its corporate name to be signed to these presents and its corporate seal to be hereunto affixed, all the day and year first above written.

Bush Terminal Company, (Sgd.) By R. G. Simonds, Vice-President. Witness: (Sgd.) A. M. Woodruff. A. W. Duckett & Co., Inc., (Sgd.) By A. W. Duckett, President. Witness: (Sgd.) D. F. Leary.

STATE OF NEW YORK,
County of New York, ss:

On this 21st day of September, One thousand nine hundred and sixteen, before me personally came and appeared R. Gould Simonds, to me known and known to me, who being by me duly sworn did depose and say that he resides in the Borough of Brooklyn, City of New York; that he is the Vice-President of Bush Terminal Company, one of the corporations described in and which executed the foregoing lease; that he knows the seal of said corporation, that the seal affixed to said lease is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(Sgd.) Ainley W. Jones, Commissioner of Deeds.

[fol. 13] STATE OF NEW YORK,
County of New York, ss:

On this 21st day of September, One thousand nine hundred and sixteen, before me personally came and appeared A. W. Duckett, to me known and known to me, who being by me duly sworn did depose and say that he resides in the Borough of Manhattan, City of New York; that he is the President of A. W. Duckett & Co., Inc., one of the corporations described in and which executed the foregoing lease; that he knows the seal of said corporation; that the seal affixed to said lease is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(Sgd.) Ainley W. Jones, Commissioner of Deeds.

[fol. 14] IN THE COURT OF APPEALS

II. GENERAL TRAVERSE—Filed Dec. 31, 1919

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

IN THE COURT OF APPEALS

III. ARGUMENT AND SUBMISSION OF CASE

On February 13 and 14, 1923, this case was argued and submitted on merits by Messrs. Don R. Almy and Ernie Adamson, for the plaintiff, and Messrs. W. F. Norris and Howard W. Ameli, for the defendant.

[fol. 15] IN THE COURT OF CLAIMS

IV. FINDINGS OF FACT, CONCLUSION OF LAW, AND OPINION OF THE COURT BY DOWNEY, J.—Entered Apr. 16, 1923

This case having been heard by the Court of Claims, the court, upon evidence, makes the following:

FINDINGS OF FACT

I

A. W. Duckett & Co. (Inc.) the plaintiff herein is and at times hereinafter mentioned was a corporation organized and doing business under and by virtue of the laws of the State of New York, with its principal place of business in the city of New York.

9.
By its certificate of incorporation executed June 10, 1910, it was
authorized—

"To engage generally in the business of ship brokers; to act as
agents and brokers for steamships, railroads, or any other corpora-
tions, firms, or individuals; to make contracts with reference to the
purchase, chartering, and operation of steamships, but not to act as
common carriers in any capacity whatsoever; to buy, lease, build,
and own salesrooms, storerooms, storehouses, warehouses, docks, piers,
and all other personal property and real estate necessary to the carry-
ing on of such business; to buy, sell, and otherwise dispose of, hold,
own, manufacture, produce, export, and import, and deal in, either
as principal or agent and upon commission or otherwise, all kinds of
personal property whatsoever, other than bills of exchange; to make
and enter into all manner and kinds of contracts, agreements, and
obligations by or with any persons or corporations for the purchasing,
acquiring, manufacturing, repairing, selling, and dealing in any
articles of personal property of any kind or nature whatsoever other
than bills of exchange, and generally with full power to perform
any and all acts connected therewith, or rights thereunder or inci-
pient thereto, and all acts proper or necessary for the purposes of
the business."

The number of shares of its capital stock was 100 of the par value
\$50 each and the amount of capital with which it was authorized
to begin business was \$500.

From August 24, 1917, to February 11, 1919 of the period in-
volved herein, the business of the plaintiff was in the hands of John
Sheppard, jr., as temporary receiver appointed by the judge of
the District Court of the United States for the Southern District of
New York.

II

On the 19th day of September, 1916, by a certain instrument in
writing, a copy of which is marked "Exhibit One" is attached to the
[Vol. 16] petition herein and made a part thereof by reference and is
herein referred to as "Exhibit One." Plaintiff leased from the Bush Ter-
minal Company its Pier #8, in the Borough of Brooklyn, for the
period of three years beginning on the first day of October, 1916, at
an annual rental of sixty thousand dollars, payable in equal monthly
installments on the first day of each month during the term of the
lease. Plaintiff entered into possession of said pier under said lease
and used it in connection with and as a part of its business and
was so in possession thereof until the appointment of said receiver.
And said receiver thereafter continued in possession of and used
said pier until possession thereof was taken over by the United
States when and as hereinafter found.

III

The Bush Terminal, owned and operated by the Bush Terminal
Company, consisted in part of eight large piers, numerous large
warehouse buildings, and railroad tracks extending from main-line
railroads to said warehouses and on to said piers.

Pursuant to the authority vested in the President of the United States by the act of Congress, approved August 29, 1916, 39 Stat. 645, and by section 10 of the act of Congress, approved August 10, 1917, 40 Stat. 276, the Secretary of War by direction of the President of the United States took possession of the Bush Terminal in New York Harbor, including Pier 8, thereof aforesaid, evidencing said act by a general order as follows:

War Department,
Washington, December 31, 1917.

To whom it may concern:

Pursuant to the authority vested in the President by the act of Congress approved August 29, 1916, 39 Stat. 645, providing for possession and control of systems of transportation, and by section 10 of the act of Congress approved August 10, 1917, Pub. No. 41, 65th Cong., authorizing the requisitioning of storage facilities for supplies connected with the common defense, possession, and control is hereby taken, by direction of the President, of the following described parts of a system of transportation, including storage facilities; that is to say, of those portions of the Bush Terminal docks and warehouse property described in Schedule "A," and shown on the map of schedule "B," hereto annexed, in New York Harbor, to the end that they may be utilized to the exclusion of all other traffic, so far as may be necessary, and for such time as may be required, for the transportation of troops, war material, and equipment, for the storage of military supplies, and for such other purposes connected with the emergency as may be needful or desirable. Steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises, and also the fair compensation to be paid for the property in the event that the Government shall determine prior to July 1, 1918, to acquire absolute title thereto.

Done at the City of Washington this 31st day of December, 1917.

✓ Newton D. Baker, Secretary of War.

[fol. 17] And thereafter there was addressed to the Bush Terminal Company by the Acting Quartermaster General a notice as follows:

War Department.
Washington, January 3, 1918.

In reply refer to 825.1—T (Bush Terminal.)

From: Acting Quartermaster General.

To: Bush Terminal Company, 100 Broad Street, New York, N. Y.
Subject: Requisition of Bush Terminals.

1. Pursuant to the authority vested in the President by the act of Congress approved August 29, 1916, 39 Stat. 645, providing for possession and control of systems of transportation, and by section

0 of the act of Congress approved August 10, 1917, Pub. No. 41,
 55th Cong., authorizing the requisitioning of storage facilities for
 supplies connected with the common defense, possession and control
 is hereby taken, by direction of the President, of the following de-
 scribed parts of a system of transportation, including storage fa-
 cilities; that is to say, of those portions of the Bush Terminal docks
 and warehouse property described in Schedule "A," and shown on
 the map on Schedule "B," on file in this office, in New York Harbor,
 so the end that they may be utilized to the exclusion of all other
 traffic, so far as may be necessary, and for such time as may be re-
 quired, for the transportation of troops, war material, and equipment,
 for the storage of military supplies, and for such other pur-
 poses connected with the emergency as may be needful or desirable.
 Steps will be promptly taken to ascertain the fair compensation to
 be paid for the temporary use by the Government of the premises,
 and also the fair compensation to be paid for the property in the
 event that the Government shall determine prior to July 1, 1918,
 to acquire absolute title thereto.

✓ George W. Goethals, Acting Quartermaster General, By D.
 L. Brainard, Brigadier General, Quartermaster Corps, N.
 A. BJB:mk.

And there was addressed to the General Superintendent of Army
 Transport Service the following:

[Telegram]

December 31, 1917.

Major General David C. Shanks,
 General Superintendent Army Transport Service,
 New York, N. Y.:

An order has been issued by the President this date for taking
 possession and assuming control of those portions of the Bush Ter-
 minal docks and warehouse property known to you and described
 in Schedule "A" and shown on the map on Schedule "B" attached
 hereto. In conformity with said order you will take possession
 and assume control of the premises from this date.

Goethals, Acting Quartermaster General.

(825.1—T Bush Terminal.—L.)

[fol. 18]

V

Thereafter there was served upon the receiver of the plaintiff com-
 pany, by the authorized officer of the United States in charge of
 docks, wharves and terminals, a notice as follows:

[Address reply to General Supt., A. T. Service, 104 Broad Street, N. Y. City.]

War Department

Office of the General Superintendent
U. S. Army Transport Service

New York, January 1, 1918. H. S. C.

From: Supervisor, Docks, Wharves and Terminals.
To: John S. Sheppard, receiver, Duckett & Co. (Inc.), 27 Cedar Street, N. Y. C.
Subject: Notice to vacate.

1. By authority of the President of the United States, the Bush Terminal has this day been requisitioned for the use of the embarkation service of the United States Army, and possession thereof has passed to the United States.

2. It is necessary that the Government have full benefit of these premises at the earliest possible date. It is desired, however, not to inconvenience the present occupants to the extent that may bring upon them any extensive financial losses. You will therefore immediately communicate with 1st Lieutenant H. S. Cole, U. S. A., retired, officer in charge of the Division of Docks, Wharves and Terminals of this office, and make arrangements for the vacation of the premises now occupied by you.

3. Until further notice, all payments or moneys due in respect of any period commencing on or after January 1, 1918, will be made to the Bush Terminal Company for account of the United States.

By authority of the general superintendent.

(Sgd.) Hayden S. Cole, 1st Lt., U. S. A., Officer in Charge of Div. of Docks, Wharves, and Terminals.

Due service of the annexed notice upon me as temporary receiver of A. W. Duckett & Company (Incorporated), at 27 Cedar Street, New York City, by the exhibition thereof and delivery of a copy thereof to me, John S. Sheppard, jr., as such receiver, is hereby admitted, this 14th day of January, 1918.

John S. Sheppard, Jr., As Temporary Receiver of A. W. Duckett & Company.

In consummation of negotiations between the receiver and the officer of the United States in charge of docks, involving some arrangements already made with reference to the unloading of a vessel at that pier, the receiver was permitted by said officer to remain in charge for the remainder of the month of January, and the United States took actual possession of the pier at midnight of January 31, 1918.

VI

When the terminal properties were taken over by the United States a part thereof was in possession of the Bush Terminal Company unleased, and a part consisting of piers, pier space, warehouses, and warehouse space was under lease.

[1. 19] An advance payment of one million dollars was made to the Bush Terminal Company to be applied on compensation for the use of the properties taken or upon the purchase price in the event the United States should determine prior to July 1, 1918, to acquire the same, and a board of appraisers was appointed by the Secretary of War to determine proper compensation to be paid the Terminal Company for the use of the properties and also to determine the value of the properties in the event the United States should conclude to acquire title. Said board of appraisers made an award as follows: "We, the undersigned, a board of appraisers, appointed pursuant to the authority vested in the President of the United States by act of Congress approval August 29, 1916, 39 Stat. 645, providing for the possession and control of systems of transportation and by section 10 of the act of Congress approved August 10, 1917, Pub. No. 65, 65 Cong., authorizing the requisitioning of storage facilities for supplies connected with the common defence, for the purpose of ascertaining the just compensation to be paid by the United States for the temporary use and occupancy, injury, destruction, or purchase of that portion of the property owned by the Bush Terminal, situated at Brooklyn, Borough of Brooklyn, State of New York, as shown on the map and plat of the Bush Terminal (Schedule B) filed with the report of the board of appraisers, having heard the proofs and allegations of the claimant and examined the matters submitted to it, do report and award as follows:

"1. That the United States did requisition the temporary use and occupancy of a portion of the premises known as the Bush Terminal, as shown on the map and plat of the Bush Terminal filed with the report of the board of appraisers, marked "Schedule B," from the third day of January, 1918, and still occupies the same; that just compensation for the use and occupancy of that portion of said premises not under lease at the time the same was requisitioned is \$9,807.71 per month or at the rate of \$1,077,692.60 yearly, which said monthly sum is increased from time to time as the respective leases for other portions of said premises under lease at the date same was requisitioned terminate, and as further increased by the monthly reserve rent due to the Bush Terminal as provided by the respective leases (except the lease to Duckett & Co., Inc., for Pier 8, which reserved rent is reduced from \$5,000 per month to \$2,325 per month), and which reserved rent has heretofore been agreed shall be paid to the Bush Terminal instead of to the respective claimant.

"The said items of monthly rent for unleased space, increases arising from leases terminating, and the reserve rent from January 3, 1918, to December 31, 1918, including interest thereon, amount to

the sum \$1,934,463.63, from which shall be deducted the rent advanced to the Bush Terminal, with interest thereon to December 31, 1918, amounting to \$1,053,500.00, leaving a balance due the Bush Terminal December 31, 1918, of \$880,963.63. Award is accordingly so made as of December 31, 1918, to the Bush Terminal for \$880,963.63.

"2. From the amount herein awarded should be deducted any and all sums collected by the Bush Terminal as rent from tenants who have occupied any of said premises after January 3, 1918.

[fol. 20] "3. The monthly just compensation to be paid the Bush Terminal at the end of each calendar month for the use and occupancy of the said premises after January 1, 1918, so long as the United States shall continue to use or occupy the same, is as follows:

"For that part of said premises which was not under lease January 3, 1918, the date same was requisitioned by the United States, the sum of \$89,807.71 per month, or at the yearly rate of \$1,077,692.60; and for the remaining several portions of said premises constituting the leased parts thereof, at the date same was requisitioned, as follows:"

There follows a schedule in forty-five items relating to piers, warehouses, warehouse space, etc., designated by number and followed by the monthly rental aggregating \$63,105.52 per month, the rentals stated in the schedule being the rentals reserved in the leases of the various tenants except that the rental of Pier 8 was reduced from \$5,000 per month as provided in the lease to \$2,325 per month.

This award was accepted by the Bush Terminal Company and payment thereunder authorized by the Secretary of War and made.

VII

The receiver for the plaintiff company had paid to the Bush Terminal Company the rental as provided in the lease for the month of January but paid no rental thereafter. In the latter part of January a bill, in usual course, dated February 1st, for February rental under the lease was sent the receiver, who on January 30th, wrote the Bush Terminal Company stating that he had been served with notice to vacate the pier and had arranged with the officer in charge that the pier should be surrendered to the United States at midnight of January 31st, and in reply the Bush Terminal Company directed him to destroy the bill.

For the use of the pier in unloading a vessel during that part of the month of January subsequent to the service of the notice to vacate, during which period the receiver had been permitted by the officer in charge to remain in possession, the receiver collected and retained the charges. The unloading not being completed until some time in the month of February, the receiver, at the same time, by authority of the officer in charge collected the charges accruing during the month of February and paid that portion thereof to the United States.

For the period beginning February 1, 1918, the United States paid the Bush Terminal Company for the use of all the properties taken over, included in which was payment for the use of Pier 8 on the basis of \$2,325 per month and the Bush Terminal Company accepted the payments made as full compensation for the use of all the properties taken.

VIII

At midnight of April 30, 1919, the United States vacated Pier 8 and surrendered possession thereof to the Bush Terminal Company, and that company executed to the United States a release as follows:

New York, N. Y., May 1, 1919.

Bush Terminal Company, in consideration of the return to it by the United States in good order and condition in complete state of repair, of premises known as Pier #8, located at Bush Terminal, [fol. 21] Brooklyn, New York, which return in said good order and condition and complete state of repair is hereby acknowledged to have been accomplished, does hereby forever release the United States from any and all claims from suit, debts, obligations, and liabilities of whatsoever kind and nature which may arise or may have arisen by reason of occupation of said premises by the United States under requisition by act of Congress, dated August 29th, 1916, but not including claims for supplies, material, labor, or services otherwise furnished to the Government prior to May 1st, 1919, and with the further exception of one year rental guarantee from date.

Bush Terminal Company, by R. G. Simonds, Vice President.

Signed, sealed, and delivered in the presence of: John A. Heinrich. [Corporate seal impressed.]

IX

On April 12, 1919, the plaintiff company, being advised that the United States would shortly release Pier 8, notified the Bush Terminal Company that immediately upon such release it would take over the pier "as per lease dated September 19, 1916," the receipt of which communication the Terminal Company acknowledged on April 17th and said:

"The United States, as we are advised, proceeded upon the theory that our leases were not extinguished by their action in commandeering our property.

"If it is your desire to proceed upon that theory, and you will pay to us the rent reserved in your lease, and take credit only for the payment made to us by the Government, we will not object to your going into possession again."

On April 19th the Terminal Company requested of plaintiff a speedy reply to its letter of the 17th "in order that the matter of the occupancy of Pier #8 may be speedily disposed of" and on April 22d the plaintiff wrote the Terminal Company as follows:

"Replying to your favors of recent date with regard to the lease of Pier 8, we can not see that you are entitled to the difference between the rent reserved in the lease and the rent that you received from the Government.

"The seizure of the pier by the Government created a situation whereby you could not fulfill the terms of the lease because you could not give us possession of the pier and therefore the consideration for the rent reserved failed. We certainly do not intend to pay for what we did not get.

"We are content to stand upon the fair ground that the emergency under which the Government seized the pier suspended temporarily the lease between us, but now that the Government is returning the pier we intend to maintain our rights and insist upon possession from the day the Government vacates, under the terms of the lease.

"It seems to us that that is the fairest way for both of us to handle the situation, and we are advised that it is our right to demand possession of the pier when the Government vacates."

Thereafter the Bush Terminal Company, being advised by counsel that Duckett & Co., by reason of refusal to pay arrears of rental, had forfeited their rights under the lease and that the Terminal [fol. 22] Company was privileged to relet the pier to others, did so relet it, the time of such reletting not being shown, and at an increased rental.

X

Pier #8 of the Bush Terminal was a new pier completed in 1916, equipped in a modern manner, and the plaintiff company was its first occupant as a tenant. It was located at the foot of 39th Street in the Borough of Brooklyn, adjoining the municipal ferry and parallel with and north of seven piers numbered from 1 to 7 inclusive already owned and operated by the Bush Terminal Company. It was 625 feet long and 60 feet wide and was a one-sided pier, that is a pier at which vessels could dock on but one side, and a single deck pier. It was 206 feet from Pier 7, one half of which space was available for docking on the south side, the north side being occupied by the ferry slips. The other piers were all much longer than Pier 8 and were double or more than double the width and furnished berthing space for two large and in some instances three average vessels on each side. Pier 8 did not furnish berthing space for more than one vessel at a time unless they were smaller than the average of the vessels entering and leaving this port and requiring this character of docking facilities.

XI

The demand for piers in New York Harbor had been on the increase for some time previous to 1918 and continued to increase very materially during 1918 and 1919 until at times the demand exceeded the supply. By reason of these conditions the rates charged and paid for the berthing of vessels increased and particularly so during 1918 and 1919 and to such an extent that during those years there was but

little if any stability in that respect and in some instances the necessities of the situation resulted in the charging and paying of rates several times larger than those charged and paid for the same accommodations before the unusual activities in shipping due to the World War.

XII

A pier in New York Harbor at which berthing space was rented for the use of vessels could be so operated that berthing rentals accrued for three-fourths of the time.

XIII

The United States was in possession of Pier #8 for 454 days, and the unexpired term of plaintiff's lease after the surrender of the pier to the Bush Terminal Company was 153 days. The reasonable value of the use of the pier during that time was \$200 per day on the basis of a full time valuation.

CONCLUSION OF LAW

Upon the facts found the court concludes as matter of law that the plaintiff's petition should be dismissed for want of jurisdiction and it is so ordered with judgment against the plaintiff for cost of printing the record, to be taxed by the clerk.

[fol. 23]

IN THE COURT OF CLAIMS

OPINION

DOWNNEY, Judge, delivered the opinion of the court:

The plaintiff sues to recover the reasonable value of the use of Pier 8 of the Bush Terminal from midnight of January 31, 1918, until midnight of September 30, 1919. The Bush Terminal Company of New York owned and operated what is known as the Bush Terminal, in the Borough of Brooklyn, and which for the most part consisted of a series of eight piers, numbered from one to eight, inclusive, and more than a hundred warehouses, with 30 miles of railroad tracks extending from main-line railroads to said warehouses and onto said piers.

In September of 1916 the plaintiff company had entered into a lease with the Bush Terminal Company for the use of Pier 8 for the period of three years, beginning on the first day of October, 1916, at an annual rental of \$5,000, and was in possession of said pier under said lease from October 1, 1916, until August 24, 1917, from which last-named time until February 11, 1919, the pier was in possession of John S. Sheppard, Jr., a temporary receiver for the

business of the plaintiff company appointed by the judge of the District Court of the United States for the Southern District of New York.

On December 31, 1917, by an order of the Secretary of War of that date, the United States took possession of the Bush Terminal properties above referred to, and on the 3d of January, 1918 the Acting Quartermaster General served formal notice on the Bush Terminal Company that it had requisitioned the Bush Terminal properties described in an attached schedule, which included all of the said Bush Terminal properties in the Borough of Brooklyn, consisting of piers, warehouses, and appurtenant railroad facilities.

On the 14th day of January, 1918, by a notice dated January 1, 1918, but served on said January 14, the receiver of the plaintiff company was notified that by authority of the President of the United States the Bush Terminal had been requisitioned for the use of the embarkation service of the United States Army, and possession thereof had passed to the United States, and that it was necessary that the Government have full possession of these premises at the earliest date possible, and he was requested to communicate with the officer of the United States Army in charge of the division of docks, wharves, and terminals and make arrangements for the vacating of the pier.

The lease, the order of the Secretary of War, the notice to the Bush Terminal Company, and the notice to the receiver of the plaintiff company appear in full in the findings, and may be referred to herein to the extent necessary in the discussion of the questions involved without quoting.

The receiver of the plaintiff company had paid to the Bush Terminal Company the rental provided in the lease for the month of January, 1918, and, there being certain commitments involving the use of the dock during that month for the purpose of unloading a vessel, it was agreed between the receiver and the officer in charge of docks, wharves, and terminals that the receiver should vacate and surrender possession of Pier 8 to the United States at midnight of January 31, 1918, which he did. Such revenues as accrued from the use of the pier during the month of January were retained by the receiver, but [fol. 24] the unloading of the vessel which had docked at Pier 8 during the latter part of January, not having been completed when the pier was turned over to the possession of the United States, the receiver, by virtue of an arrangement between him and the officer in charge of docks, collected the portion of the revenues arising from such use of the pier during the month of February, together with revenues arising during the month of January, and paid over to the United States such revenues accruing during February. The pier was vacated by the United States and surrendered to the Bush Terminal Company at midnight of April 30, 1919.

When the Bush Terminal properties were thus requisitioned by the United States, a part thereof were in the possession of the Bush Terminal Company unleased, but many parts thereof, including piers and warehouses and pier and warehouse space, were in the possession of tenants of the Bush Terminal Company. A board of

appraisers was appointed to determine the compensation to be paid by the United States to the Bush Terminal Co. for the use of the Bush Terminal properties, and they made a report, which is set out in the findings, in which they determined not only the compensation to be paid to the Bush Terminal Co. for the portions of the properties not under lease, but also determined by items the payments to be made to the Bush Terminal Company on account of the several items in the possession of tenants at the time the properties were taken over, some of whom for various times were permitted to remain in possession, in connection with which they determined the rental value of Pier 8 to be \$2,325 per month, and as a part of the compensation paid the Bush Terminal Company by the United States for the use of its properties during the period of Government occupancy that company was paid for Pier 8 at said rate of \$2,325 per month. Subsequent to January of 1918 neither the receiver for the plaintiff company nor the plaintiff company itself paid any rent for said pier.

Soon after the taking over of the terminal properties by the United States the United States paid to the Bush Terminal Company \$1,000,000 to be applied upon the compensation for the use of the properties taken, or upon the purchase price of the properties in the event that the United States should determine prior to July 1, 1918, to acquire absolute title thereto, as indicated in the instrument of appropriation, and in the determination by the board of appraisers as to the compensation due the Bush Terminal Company for the first year of the occupancy of its properties by the United States this \$1,000,000 was credited as an advance payment upon the compensation determined, and the award made by this board of appraisers was accepted by the Bush Terminal Company and payment thereunder authorized by the Secretary of War, and made. This award as made and accepted by the Bush Terminal Company covered the use by the United States of all of the properties taken, whether in the possession of the Bush Terminal Company unleased or in the possession of tenants. When the United States surrendered the possession of Pier 8 to the Bush Terminal Company, that company executed to the United States a release "from any and all claims from suits, debts, obligations, and liabilities of whatsoever kind and nature which may arise or may have arisen by reason of occupation of said premises by the United States," said release appearing in full in the findings. There are other facts pertinent to the questions involved which are set out in the findings and reference may be made thereto as occasion requires.

Counsel on both sides of the case devote their attention largely to discussion of the question of fact as to just compensation in addition to which the defendant raises a question as to the jurisdiction of the court, predicated upon the statute involved.

The jurisdictional question raised is necessarily for determination and naturally has priority; but assuming it determined that this court has jurisdiction in this respect, it does not follow that only the question as to the amount of compensation remains, for, preceding that question, there is for determination the basic question as to

whether there is any right of recovery in the plaintiff, and upon determination of that question another jurisdictional question may arise.

Upon the jurisdictional question raised it is, of course, to be conceded that if the case is under section 10 of the Lever Act, 40 Stat. 279, as contended, this court is without jurisdiction. United States v. Pfistch, 256 U. S. 547. But we do not so regard it, and neither has the plaintiff so predicated its case. The plaintiff declares upon a requisitioning of its pier, the implied contract arising therefrom, and the jurisdiction of this court under section 145 of the Judicial Code.

The general order under which the United States took possession of the properties of the Bush Terminal Company declared that such action was taken pursuant to the authority vested in the President by the act of Congress approved August 29, 1916, 39 Stat. 645, and section 10 of the Lever Act, and the character of the properties taken indicates clearly the reason for the reference to the two acts as the authority for the taking.

The act of August 29, 1916, authorized the taking of "any system or systems of transportation or any part thereof and to utilize the same to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material, and equipment," etc., while section 10 of the Lever Act applied, so far at least as this case is concerned, to "storage facilities." The properties of the Bush Terminal which were taken consisted of piers in New York Harbor, railroad tracks leading thereto and thereon, and warehouses. It seems apparent therefore that the recital of the two acts was because of the application of one to the piers as parts of a transportation system and the other to the warehouses as "storage facilities," and it is a matter of common knowledge that these piers were in fact very largely used "for the transfer or transportation of troops, war materials, and equipment" during the World War. They and the railroad tracks appurtenant thereto were "transportation" and not "storage" facilities, and this conclusion determines the jurisdictional question raised.

Assuming the correctness of the conclusion, the case presented is one involving a taking of property under authority of the act of August 29, 1916, which contains no provisions as to compensation such as are found in section 10 of the Lever Act, with a right to recover just compensation as upon an implied contract if upon the facts such an implication arises, and the jurisdiction of this court is, because of its jurisdiction under section 145 of the Judicial Code, of actions founded "upon any contracts, express or implied."

[fol. 26] In this view of the case we have for consideration the very important question whether under the facts found there was such a taking from the plaintiff of its property as gives rise to an implied promise to pay the plaintiff therefor, and upon this question, in view of the status of the plaintiff as a tenant, we are, so far as our researches have developed, without direct authority, although established fundamental principles seem applicable.

It appears that included in the Bush Terminal properties which were taken over by the United States there were eight piers, of which

No. 8, the one here involved, was the last built and much smaller than the others, and a considerable number of large warehouses, all of such extent that aside from the parts of these properties which were in possession of the Bush Terminal Company and not under lease and which, judged by rental value, we may infer from the record constituted more than half of the properties, there were approximately forty tenants occupying such parts of the properties as to command a rental of more than sixty thousand dollars per month. It was against all of these vast properties collectively that the United States proceeded under the authority vested in the President, and its procedure with reference thereto was against the Bush Terminal Company.

Its action against the plaintiff was not by way of a commandeering order against it but was a notice to it that "the Bush Terminal has this day been requisitioned for the use of the embarkation service of the United States Army," followed by a suggestion as to a desire not to inconvenience present occupants and a direction as to arrangements for the consummation of the vacation of the pier. And the pier in question was a part of the "Bush Terminal" which it was said had been requisitioned. The service of the notice was acknowledged by the receiver of the plaintiff company, who had paid rent for the pier for the month of January, and very amicable negotiations between him and the officer in charge, because of commitments for the use of the dock during that month, resulted in an agreement that the receiver might retain possession until January 31st and turn the pier over at midnight of that day, which he did without objection or protest and from that time on paid no rent. *

When the United States commandeered the Bush Terminal, including Pier 8, and notified the plaintiff receiver of that fact and that he must arrange to vacate, the result of its action was to take the possession of the pier, which was then in the receiver and, in practical effect, to deprive the receiver of that leasehold interest therein which he then held and if a lease is property, which it must be conceded to be, and may therefore be the subject matter of a "taking," it is rather natural than otherwise to conclude that in this instance the United States "took" from the plaintiff's receiver a leasehold interest in the pier and must make just compensation to the plaintiff therefor. But this conclusion is one of natural matter of fact import rather than of legal derivation, since, as it seems to us, some of the elements of a "taking," out of which an implied contract to pay arises, are lacking.

It is not every actual taking or using of the property of another which constitutes such a "taking" as gives rise, coupled with the applicable provision of the fifth amendment, to the implied contract to pay which must be the basis of a recovery in this court.

[fol. 27] In Tempel v. United States, 248 U. S. 121, the United States assumed that it had the right to submerge and navigate over and further dredge the plaintiff's land, which facts, it was held, precluded the implication of a promise to pay, although the United States did in fact dredge and submerge and in fact take plaintiff's land.

In *Hill v. United States*, 149 U. S. 573, the United States asserted a right to the use of the land in question as against the plaintiff or any other person, and it was held that the action should have been dismissed for want of jurisdiction. And this case was said to be governed by *Langford's case*, 101 U. S. 341, in which case the United States, in taking possession of the property claimed by the plaintiff, asserted its own title and it was held that no implied contract to pay could arise.

Since these cases and others along the same line, touch necessarily, as we construe them, upon a requisite element of an implied contract, it is not inappropriate, as reflecting historically the jurisdiction of this court and the later holdings, after its enlargement, to say that when the *Langford* case was decided this court's jurisdiction, defined by sec. 1059, R. S., was founded upon "any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied," and that by the act of March 3, 1887, 24 Stat. 505, which became practically section 145 of the Judicial Code, there was added to its jurisdiction "claims founded upon the Constitution of the United States." But notwithstanding this addition and the provision of the fifth amendment as to just compensation, and the suggestion in a dissenting opinion in the *Hill* case that, by reason of the provisions of that act, the jurisdiction of this court was as of an action founded on the Constitution, the jurisdiction of this court has consistently since that time, in this class of cases, been held to be a jurisdiction of cases founded upon an implied contract. This is material, since if the facts do not justify the implication of a legal contract to pay, this court is without jurisdiction.

The cases cited above are illustrative of the fatality of the absence of any necessary element of an implied contract to pay, the absence in those cases of any intention to take the property of the claimants even though it was actually taken. An intention to take was wholly inconsistent with the asserted right. Such an intention may, of course, be implied rather than expressed as, for example, in the cases with which we have had to do where the United States by the erection of dams in streams has permanently overflowed lands and the intention to take is to be inferred because it was the necessary and easily to be ascertained result of the act done and must have been anticipated, but likewise may the absence of any essential element of an implied contract be a matter of justified inference from the circumstances of the case. In *Horstman Company and Natron Soda Company v. United States*, 257 U. S. 138 at 146, referring to the necessity for the implication of a contract to pay in order to bind the Government, it is said, "but the circumstances may rebut that implication." See *Ball Engineering Co. v. White & Co.*, 250 U. S. 46-57.

Consideration of this case is necessarily a reminder of the well-known and urgent governmental needs at the time involved. They were the needs of a great emergency. Ships were being procured for the transportation of troops and supplies, but adequate and convenient [fol. 28] embarkation facilities were necessary, and they were best to be had by utilizing the great Bush Terminal. Obstacles to a renting presented themselves, and under the authority vested in the

President a general commandeering order was issued by the Secretary of War, taking over for governmental purposes in connection with the transportation of troops and supplies this great system of docks and warehouses, notice to that effect being served on the Bush Terminal Company. Many docks and parts of docks, warehouses, and parts of warehouses were in the possession of tenants.

Could it be conceived that in these circumstances the Government must meet its emergency by requisitioning berthing space for a ship from this tenant and for another ship from another tenant, and warehouse space from various tenants. Rather did it do the natural, the efficient, the necessary thing. It requisitioned the Bush Terminal from its owner, the Bush Terminal Company. And it took it not simply for temporary use but for such use, coupled with a right to determine within a given time whether it would take over the title thereto.

It served no instrument of requisition, either in form or effect, upon the plaintiff, but, on the contrary, it notified the plaintiff that it had requisitioned the Bush Terminal and that possession thereof had passed to the United States, followed by suggestions as to the vacating of Pier 8, and later by negotiations resulting in the fixing, by agreement, of a time when the plaintiff's receiver would vacate, which he did at the time agreed upon without objection or protest.

It would seem thus that even though the action of the United States served to deprive the plaintiff of the possession of the pier and to take over a use thereof which was the equivalent of that enjoyed by the plaintiff under its lease, there was no action directed against the plaintiff in this respect, but the United States proceeded, so far as the plaintiff was concerned, upon the theory that it had already acquired, by virtue of its requisitioning of the Bush Terminal from the Bush Terminal Company, the right to the use of Pier 8 in common with all the other properties taken. And if in fact the United States thus invaded the rights of the plaintiff, is it not, as was said in the Kelly case, 243 U. S. 328, even though the facts and the application of the principal are widely different, "the character of the invasion * * * that determines whether it is a taking."

Had the United States desired to acquire the use of Pier 8 only, and had it known that it was in the possession of the plaintiff as a tenant, it might have commandeered the plaintiff's leasehold and placed itself practically in the position of a sublessee, with liability to pay rent as just compensation, and the result accomplished, so far as the possession and use of the pier are concerned, would have been the same, but it is not the result alone which determines liability in this class of cases. The result, which is in fact the damage inflicted, must have followed from an invasion of plaintiff's rights of such a character and under such circumstances as necessarily imply an intention to acquire some property right from the plaintiff and a promise to pay the plaintiff therefor. The mere removal of the plaintiff as an obstacle to the enjoyment of a right otherwise acquired does not measure up to liability upon an implied contract, even though the result, so far as the plaintiff is concerned, may have been the same.

[fol. 29] And is it reasonable to assume, as bearing upon the ques-

tion of intention as a necessary element of an implied contract, that the United States, having specifically requisitioned the Bush Terminal from the Bush Terminal Company intended to duplicate its procedure in that respect as to each of forty or more tenants by separately requisitioning again from them? If it be said that it was the tenants who held the right to the use of the several portions of these properties embraced in their leases and not the Bush Terminal Company, and that those interests in its properties which it had committed for a time to others could not be taken from that company, such a condition, if true, could not determine the action of the United States or put it in the position of having done something which it did not do. If it did not in fact take from the plaintiff such right of occupancy as it held in Pier 8 under such circumstances as justify the implication of a contract to pay the plaintiff therefor, it is immaterial how it took or what possible wrong it may have inflicted on the plaintiff by the taking, for unless, so far as this case is concerned, we can raise up an implied contract as between the United States and this plaintiff, there is nothing for our consideration.

In Johnson's case, 2 Ct. Clms. 391 and 4 Ct. Clms. 248, it is held in substance that when the United States occupies the property of another the use and occupation are private property taken for public use, and that the Government is deemed to have entered as a tenant under an implied contract of leasing, whereof the just compensation secured by the Constitution is the rent, and in Loyd v. Hough, 1 How. 541, discussing an action in assumpsit for rent necessarily to be founded on a contract, express or implied, it is said that the action will not lie when the possession has been acquired under a different title or where it was tortious, and, in a case cited, it is said that the action for use and occupation is founded on privity of contract. There was not attempt in the instant case to acquire possession under the plaintiff's title. "Such relationship (landlord and tenant) will never be implied when the acts and conduct of the parties are inconsistent with its existence." 142 U. S. 407.

It may be suggested further that no contract to pay can be implied as against the United States because of a taking of property unless the taking was authorized. In the Tempel case, *supra*, it is said in a footnote that "Nowhere does it appear that the Secretary of War authorized the taking of the property involved in the suit." In the Langford case, *supra*, reference is had to the enforcement of "valid contracts" which, it is said, could only be valid as against the United States when made by some officer of the Government acting under lawful authority, with power vested in him to make such contracts. See also United States v. North American Co., 253 U. S. 330-333. Aside from preceding suggestions as to procedure in this matter, it does not appear that anyone having to do with the transaction, so far as the plaintiff is concerned, had any authority to requisition anything from it. The officer serving as General Superintendent of the Army-Transport Service was notified by Gen. Goethals, Acting Quartermaster General, that an order had been

ed by the President taking possession and assuming control of Bush Terminal and directing that he (the Superintendent of Transport Service) "in conformity with said order" should take possession of and assume control of the premises. Subsequent proceedings were by subordinates of the Superintendent of the Transport Service and if otherwise than in compliance with instructions to proceed under the general order against the Bush Terminal, they were not, they were without authority. If, therefore, there was any authorized taking of Pier 8 from the plaintiff, using the word "taking" in the sense in which we use it as an element of an implied contract to pay the plaintiff therefor, it must have been because the taking of the whole from the owner necessarily included, as an additional and separate liability, the taking of a part from a tenant, even though there may have been no knowledge or intent as to the tenant's interest. We can not assent to the theory that if the President for war purposes took from the owner the use of a large office building, occupied by many tenants, such a taking became the basis of an additional implied contract as between the United States and each tenant.

It is to be observed that authorities discussing the rights of tenants when made parties defendant in condemnation proceedings are not in point. We assume that it is not necessary to discuss essential difference between proceedings in condemnation and cases of this kind.

We suggest a further question which, in view of the conclusion already reached, need not be discussed in detail or, in fact, decided, and that is whether the taking over of the Bush Terminal from the owner did not terminate the leases of the tenants. The taking was for war purposes, authorized under the war power of the President, even though also by statute, to which power the rights of parties under private contracts must be subordinated. In *Gates v. Goodloe*, 270 U. S. 612, the question decided went only to the liability of lessees to pay rent, but the authorities cited go far toward sustaining the conclusion that in such event private contracts inconsistent with the exercise of a sovereign right are dissolved.

It is now very much in point to refer to the *Omnia Commercial Company, Inc., v. The United States*, decided by the Supreme Court of the United States April 9, 1923, and since our expressions as to the merits of this case were in type before the opinion in the *Omnia* case reached us, we do not attempt references at appropriate points in this opinion to valuable and pertinent suggestions found in the comprehensive discussion of a similar question in the *Omnia* case but content ourselves with a general reference thereto, confident that the pertinent points will readily find their application and, if not directly, lend approval to a part at least of what we have said and sustain the conclusion reached.

Our conclusion must be that the circumstances of the case do not justify the implication of a contract on the part of the United States to pay the plaintiff for the use of the pier in question, and since jurisdiction to award compensation is dependent upon the as-

certainty of an implied contract, and damages may not be awarded on any other basis, it follows that, in accordance with the rulings of the Supreme Court as to proper procedure in such circumstances, the plaintiff's petition must be dismissed for want of jurisdiction.

Graham, Judge; Hay, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

[fol. 31]

IN THE COURT OF CLAIMS

V. JUDGMENT OF THE COURT

At a Court of Claims held in the City of Washington on the Sixteenth day of April, A. D., 1923, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do order, adjudge and decree that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of Five hundred and thirty-nine dollars and sixty-three cents (\$539.63), the cost of printing the record in this court, to be collected by the clerk, as provided by law.

IN THE COURT OF CLAIMS

VI. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On May 17, 1923, the plaintiff filed a motion for a new trial. On May 28, 1923, the court overruled said motion and handed down the following memorandum:

[fol. 32]

IN THE COURT OF CLAIMS

VII. MEMORANDUM DENYING MOTION FOR NEW TRIAL—Entered May 28, 1923

Plaintiff files a lengthy motion for a new trial, predicated upon alleged errors in the findings of fact. While such motions in this court are ordinarily treated as motions to amend findings or for additional findings of fact, they may under the rules be properly denominated motions for a new trial. To the extent, however, that they are addressed to the findings or when addressed only to the findings they are regarded as motions having for their purpose the cor-

ection of errors in, or making proper additions to the findings of fact, and not as necessarily reopening the case unless the changes in, additions to, the findings so require.

It is to be said at this point that the motion filed raises no question as to the correctness of the conclusion of the court. In other words there is no error of law assigned.

That the situation presented as to the findings may be correctly understood, it is deemed advisable that some expression with reference thereto be given.

The first point of objection to the findings refers to the last paragraph of Finding I and is upon the ground that the court erroneously found that "from August 24, 1917, to February 11, 1919, the period involved herein, the business of the plaintiff was in the hands of John S. Shepherd, jr., as temporary receiver," etc. There is an apparent error in this language by reason of the omission of one word from the print, but it is a wholly immaterial matter. The period involved clearly appears from all the findings as well as the period of the receivership, and when before the words "the period involved herein," the word "of" is inserted, the error, typographical in its nature, is corrected. The court will direct the insertion of the word "of" in the findings as originally made and filed.

For its second point the plaintiff alleges error in Finding VI in that after setting out the letter of date January 1, 1918, from the officer in charge of the division of docks, wharves, and terminals, to plaintiff's receiver, there was failure to also set out a letter dated January 16, from the receiver to said officer, together with his reply thereto.

It is noted first that the matter referred to does not appear in Finding VI. It does appear in Finding V, and we will treat it as the reference to the finding were correctly stated.

It would be sufficient reason if there were none other for rejecting this paragraph of plaintiff's motion upon the ground that the matter now sought to be incorporated in the findings and made the basis of error by reason of its omission was not requested by the plaintiff in its original request for findings of fact.

[Vol. 33] This is material since it has its foundation in a rule of the Supreme Court with reference to practice in this court. Rule V of the Supreme Court requires the making and filing of findings of fact in this court and is followed by Rule V with reference to the parties of parties, providing that—

"In every such case, each party, at such time before trial, and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact."

But, aside from that question, the letter sought to be incorporated, and the officer's reply thereto, are wholly immaterial. The communication set out was the formal notice given to the plaintiff that the United States had taken over the Bush Terminal. The letter sought to be incorporated refers simply to some prospective arrangements as between the receiver and the officer which had been dis-

cussed by them and which had reference to some commitments made for the use of the dock during the month of January. The final paragraph of Finding V, stating the situation in general terms, incorporates everything with reference thereto which is in anywise material.

For its third ground of objection the plaintiff alleges error in that it is stated in Finding V that "a board of appraisers was appointed by the Secretary of War to determine proper compensation to be paid the Terminal Company for the use of the properties, and also to determine the value of the properties in the event the United States should conclude to acquire title. Said board of appraisers made an award as follows:", and the error is alleged to be in the fact that the board of appraisers was appointed not only to determine the proper compensation to be paid to the Bush Terminal Company but also the proper compensation to be paid to the tenants. Again the plaintiff is in error in its averment in this respect since the statement quoted to which objection is made is not found in Finding V. But it is in Finding VI, and again we treat it as if the finding reference were correctly given.

In support of the allegation of error in this respect reference is made to certain exhibits in the record, but if the facts were material as to the authority of the board the references are of doubtful character as to their probative value. Upon the whole question as to the duties assigned to this board the record is unsatisfactory, and it is particularly noticeable that it does not disclose at all the official order constituting this board and the duties assigned to it. Plaintiff's first reference is to a communication by the board itself under date of April 26, 1918, to the general superintendent of the Army Transport Service at New York, in which it is stated that "the board has been ordered to settle all damage to tenants," etc., but by whom or by what authority is not shown. The second reference in support of plaintiff's contention is to an opinion of the Judge Advocate General. This opinion, it may be said, is not competent as proving any fact; there is no material fact stated there, in so far as the plaintiff is concerned, and besides it is a public document, to which reference may be made if desired without incorporation in the findings. The next reference is to a communication from Colonel Dalton of the Quartermaster Corps to plaintiff's receiver, dated May 1, in which notice is given that claims for damage must be presented without delay to the board of appraisers, etc. The next reference is to an acknowledgment by the board of appraisers of the receipt from the plaintiff's receiver of a claim by reason of the taking over of Pier 8, and the final reference is to a memorandum made by the plaintiff's receiver himself with reference to a conference he had had with a member of the board of appraisers.

These references do indicate that by some one at some time this board of appraisers had been directed to consider the claims of tenants, or that the board of appraisers had construed such claims to be within its jurisdiction, and the court was not unmindful of these features of the record when the findings of fact were made. It acted deliberately in omitting such matter from the findings,

d in that respect its former action still seems to have been entirely correct.

The situation is peculiar and perhaps deserves some attention. It first to be said that none of this matter now sought to be incorporated in the findings was asked for by the plaintiff in its original quests.

Assuming that the references of plaintiff to parts of the record cited in support of its motion are to be taken as in support of its allegation that the court was in error in stating that this board of appraisers was appointed to determine the compensation to be paid the Bush Terminal and not also stating that it was to determine the compensation to be paid to the tenants of the Bush Terminal Co., is to be noted that the plaintiff concedes, in its brief in this court, the correctness of the court's statement, so far as it goes, with reference to the appointment of this board of appraisers, for in its brief it says "there appears in the record a copy of an 'award to Bush Terminal' and its acceptance by the Bush Terminal. This was made by a board of appraisers ordered by the War Department to make an offer of compensation to the Bush Terminal which if accepted would avoid litigation between the Bush Terminal and the government. It was offered to supplement the testimony on the subject of what the Government had paid to the Bush Terminal." There is nothing in the findings as made indicating that the incorporation of this award to the Bush Terminal made by this board of appraisers was not for the purpose stated by the plaintiff itself. There was an apparent reason why the findings should show the action taken by the United States with reference to the adjustment with the Bush Terminal for the occupancy of all of these properties, and the findings show as a quite material matter in that respect that adjustment was made with the Bush Terminal and payment made in accordance with the award made by this board of appraisers.

But does it follow that it was incumbent on the court to go into the question of the authority of this board of appraisers to consider the claims of tenants? The authority, if any, only inferentially appears, but there are more forcible reasons for questioning whether the action, if any such action was taken by this board of appraisers with reference to the claims of tenants, need enter into these findings. And in that connection it is also to be said that there was *an omission* from the findings of certain facts shown by the record with reference to the claim of this plaintiff and which very peculiarly plaintiff does not now seek to have incorporated in the findings. It did not originally and it does not now ask to have the findings show that its receiver did in fact file a claim with this board of appraisers and that [fol. 35] this claim was disallowed. The fact in this respect is that upon argument of this case the plaintiff sought to and so far as it could did repudiate the claim filed by the receiver with this board. Its counsel then stated to the court that the receiver did not properly understand the situation when he filed that claim and that plaintiff should not be bound thereby.

But there is a broader and a better reason why any such procedure

as is now referred to was not for incorporation in the findings, and it is quite apparent that the plaintiff's position now taken with reference thereto is inconsistent with the theory upon which it prosecuted its action in this court and to which the court gave its approval.

The question was raised upon the original presentation of this case as to whether this court had jurisdiction and that question as presented depended upon the question as to whether the taking was under section 10 of the Lever Act or under the act of August 29, 1916. The plaintiff's theory presented in its petition and thereafter was that there was a requisitioning under the last-named act and that the jurisdiction of this court was under section 145 of the Judicial Code. We had no doubt as to the correctness of this theory.

It ought not to be necessary to call attention again to the different procedure necessarily following action of the Government under these two statutory provisions. The act of August 29, 1916, simply authorized the President to requisition transportation facilities and, making no provision with reference to the fixing of compensation therefor, the remedy was necessarily upon an implied contract to make just compensation with jurisdiction in this court predicated upon section 145. Under section 10 of the Lever Act there were specific provisions as to the method of determining compensation. It provided that the President should fix the compensation, and that, if not satisfactory to the person entitled to receive the same, he should be paid 75 per cent thereof with his right of action following. If the plaintiff now regards it as material to endow this board of appraisers with authority to fix compensation of tenants as the duly authorized representative of the President and the action taken by that board in that respect, if it did in fact fix compensation to be paid tenants, is material as tending to determine the nature of the taking, and whether under section 10 of the Lever Act or the act of August 29, 1916, plaintiff's position would then tend to support the theory that the taking was in fact under the Lever Act and as stated in the original opinion in this matter, it is, of course, beyond question that if the procedure were under that act this court is without jurisdiction.

But we are inclined to think rather that the plaintiff is now, through some misapprehension, making some contentions which are not to be treated as affecting the merits of the case in any degree whatever, and that there is no good reason assigned why the court was in error in any respect, except as to the quite immaterial matter first mentioned, correction of which is ordered, as above stated.

If the proceeding herein was under section 10 of the Lever Act, the plaintiff must fail in this court because of lack of jurisdiction. We have already adjudged that its action should be dismissed because, though upon another ground, we are without jurisdiction.

The plaintiff's motion is overruled.

[fol. 36]

IN THE COURT OF CLAIMS

VIII. PLAINTIFF'S APPLICATION FOR APPEAL—Filed June 12, 1923

Now comes the complainant, on this 8th day of June, 1923, by its attorneys Almy Van Gordon and Evans, and applies to this Honorable Court praying for the allowance of an appeal according to the Statutes in such case made and provided, from the judgment rendered herein in favor of the defendant, dismissing the plaintiff's petition for want of jurisdiction, to the Supreme Court of the United States, according to law, and hereby gives notice of said appeal as herein applied for.

Almy, Van Gordon & Evans, Attorneys for Claimant.

[File endorsement omitted.]

IN THE COURT OF CLAIMS

IX. ORDER OF COURT ALLOWING PLAINTIFF'S APPEAL

It is ordered by the court that the plaintiff's application for appeal be and the same is allowed.

Entered June 18, 1923.

[fol. 37] COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Downey, J.; of the judgment of the court; of the memorandum entered by the court on plaintiff's motion for a new trial; of the plaintiff's application for appeal and of the order of the court allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Nineteenth day of June, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 29,719. Court of Claims. Term No. 409. A. W. Duckett & Company, Inc., appellant, vs. The United States. Filed July 2nd, 1923. File No. 29,719.